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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204259
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In Re: Serial Nos. 77/948,333; 77/948,895; 85/310,089
Applicant's Marks: VALHALLA GAME STUDIOS, VALHALLA GAME STUDIOS and design;
Applicant's Mark in Child Case: VALHALLA ENTERTAINMENT

VALHALLA MOTION PICTURES, INC.

Opposer,

v.

Opposition No.: 91204259
(parent case)

VALHALLA GAME STUDIOS CO. LTD.,

Applicant.

VALHALLA GAME STUDIOS CO. LTD,

Opposer,

v.

Opposition No. 91206662
(child case)

VALHALLA MOTION PICTURES, INC.

Applicant.

APPLICANT'S BRIEF IN RESPONSE TO OPPOSER'S BRIEF
IN SUPPORT OF OPPOSITION

Applicant Valhalla Game Studios Co. Ltd. ("VGS"), hereby submits its reply brief in support of its application to register the mark, VALHALLA GAME STUDIOS (Serial No. 77/948,333) and VALHALLA GAME STUDIOS & Design (Serial No. 77/948,895) on the grounds that there is no likelihood of confusion between its marks and those of Opposer Valhalla Motion Pictures, Inc. ("VMP"), owner of the VALHALLA MOTION PICTURES & Design (U.S. Reg. No. 4,212,384) and VALHALLA TELEVISION & Design (U.S. Reg. No. 4,238,523).

There is no likelihood of confusion between VGS's marks and VMP's marks, as applied to their respective goods, for the following reasons:

- VMP does not have a strong mark, as its mark has never appeared on advertisements or packaging for its products, and primarily appears in closing credits for some of its motion pictures and television shows for a few seconds at most. Because there is no consumer recognition of its mark, there simply can be no likelihood of confusion with VGS's mark.
- During nearly four (4) years of actual use in common, there has been no evidence of actual confusion.
- The parties' goods are unrelated and do not travel in the same channel of commerce, as VGS's video games target hard-core gamers and are sold at video game stores, and VMP has only used its mark in closing credits of motion pictures and television shows, sold at mainstream outlets. Further, VMP has not presented any concrete plans for expansion into the video game market, where a likelihood of confusion between the products may be possible.
- The marks are not confusingly similar with respect to their appearance. VGS's mark features a dragon ship with jagged, almost gothic-style lettering. VMP's mark features a Viking ship with sails raised, floating on a cloud under a crescent moon, with smooth caps lettering.
- Relevant purchasers of both video games and DVDs are relatively sophisticated and are purchasing higher-end products, so they are more likely to be able to distinguish between the two marks.

TABLE OF CONTENTS

	<u>Page</u>
<u>INTRODUCTION</u>	6
<u>STATEMENT OF THE ISSUES</u>	7
<u>RECITATION OF THE FACTS</u>	
I. THE PARTIES	8
A. VALHALLA GAME STUDIOS CO. LTD. (“VGS”)	8
B. VALHALLA MOTION PICTURES (“VMP”	
II. THE MARKS	9
III. ARGUMENT	10
A. Because Opposer Fails to Carry its Burden of Proving Likelihood of Confusion Between Its Mark VALHALLA MOTION PICTURES and VALHALLA TELEVISION and VALHALLA GAME STUDIOS, this Board Should Deny the Petition Opposing Applicant’s Registration	10
B. VMP’s Mark is Not “Strong,” and in Fact is Not Even Known to Consumers; Thus, it is Entitled to No Added Protection Beyond That Given Any Other Registered Mark.....	12
C. The Parties’ Goods are Dissimilar, Travel in Different Channels of Trade, and are Not Marketed Under Similar Conditions.....	14
D. The Parties’ Goods Are Marketed to Different Consumers	16
E. VGS’s and VMP’s Marks Are Not Similar in Appearance, Sound, Connotation, or Commercial Impression	16
F. VMP’s Claimed “Natural” Zone of Expansion Goes Far Beyond Any Reasonable Expectations and is Not Based on Current Plans	19
G. The Likelihood of Confusion is Reduced Because Video Games are a High-End Product.....	21
H. VGS Has No Knowledge of VMP’s Mark and Further, Does Not Wish to be Associated with VMP’s Mark	23
I. No Evidence of Actual Confusion.....	24
<u>CONCLUSION</u>	25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>American Historic Racing Motorcycle Association, Ltd. V. Team Obsolete Promotions</i> , 33 F.Supp.2d 1000 (M.D. Fla. 1998).....	24
<i>AMF Inc. v. Sleekcraft Boats</i> , 599 F.2d 341 (9th Cir. 1979) (“ <i>Sleekcraft</i> ”)	11, 16
<i>Barbeque Marx, Inc. v. 551 Ogden, Inc.</i> , 235 F.3d 1041 (7th Cir. 2000).....	22
<i>Checkpoint Systems, Inc. v. Check Point Software Technologies</i> , 269 F.2d 270, 290 (3d Cir. 2001).....	19
<i>Cooper Industries Inc. v. Repcoparts USA, Inc.</i> , 218 U.S.P.Q. 81 (T.T.A.B. 1983)	15
<i>Custom Manufacturing v. Midway Services, Inc.</i> , 508 F.3d 641 (11th Cir. 2007).....	7, 12, 21
<i>E.I. Du Pont de Nemours & Co. v. Yoshida Int’l, Inc.</i> , 393 F.Supp. 502 (E.D.N.Y. 1975)	passim
<i>In re Bed and Breakfast Registry</i> , 791 F.2d 157 (Fed. Cir. 1986).....	18
<i>In re Digirad Corp.</i> , 45 U.S.P.Q.2d 1841 (1998).....	15
<i>In re E.I. du Pont de Nemours & Co.</i> , 476 F.2d 1357 (CCPA 1973) (“ <i>du Pont</i> ”).....	11, 25
<i>In re Hearst Corp.</i> , 982 F.2d 493 (Fed. Cir. 1992).....	18
<i>Keebler Co. v. Murray Bakery Products</i> , 866 F.2d 1386 (Fed. Cir. 1989).....	18
<i>Kellogg Co. v. Toucan Golf, Inc.</i> , 337 F.3d 616 (6th Cir. 2003).....	21
<i>Kemp v. Bumble Bee Seafoods, Inc.</i> , 398 F.3d 1049,1054-55 (8th Cir. 2005)	22
<i>King of the Mountain Sports, Inc. v. Chrysler Corp.</i> , 185 F.3d 1084 (10th Cir. 1999).....	18
<i>Kos Pharmaceuticals, Inc. v. Andrx Corp.</i> , 369 F.3d 700 (3d Cir. 2004).....	15

<i>Luigino's, Inc. v. Stouffer Corp.</i> , 170 F.3d 827 (8th Cir. 1999).....	18
<i>M2 Software Inc. v. Madacy Entertainment</i> , 421 F.3d 141 (9 th Cir. 2005).....	19
<i>Major League Baseball Props., Inc. v. Opening Day Prods., Inc.</i> , 74 U.S.P.Q. 2d 1102 (S.D.N.Y. 2005).....	13
<i>Meridian Mutual Insurance Co. v. Meridian Insurance Group, Inc.</i> , 128 F.3d 1111 (7th Cir. 1997).....	23
<i>Polaroid Corp. v. Polaroid Electronics Corps.</i> , 287 F.2d 492 (2d Cir. 1961).....	12
<i>Survivor Media, Inc. v. Survivor Products</i> , 406 F.3d 625 (9th Cir. 2005).....	19, 22
<i>Washington Speaker's Bureau, Inc. v. Leading Authorities, Inc.</i> , 33 F.Supp.2d 488 (E.D. Va. 1999), <i>aff'd</i> 217 F.3d 843 (4th Cir. 2000)	16
STATUTES	
15 U.S.C. § 1052(d).....	11
OTHER AUTHORITIES	
MCCARTHY ON TRADEMARKS § 11.83	12
3 MCCARTHY ON TRADEMARKS § 23:3	11
3 MCCARTHY ON TRADEMARKS § 23:52, 23-164.....	18

INTRODUCTION

By its two intent-to-use applications, VGS seeks to register the word mark VALHALLA GAME STUDIOS and the composite mark VALHALLA GAME STUDIOS in combination with a Viking Ship design for video games and related goods and services. VGS has applied for the word mark and design mark in several classes, including IC 009 for “Computer game programs; Computer game software; Computer software, namely, game engine software for video game development and operation; Video game software” and IC 042 for “Design and development of computer game software and virtual reality software.” At the time of VGS’s applications, VMP had no registered marks. Fourteen months after VGS filed its applications, VMP filed its applications for VALHALLA MOTION PICTURES & Design for “Motion picture film production” and VALHALLA TELEVISION & Design for “Television show production” and has applied for the design mark VALHALLA ENTERTAINMENT & Design in IC 041 for “motion picture film production and television show production (Based on Intent to Use) writing and editing scripts, teleplays and screenplays for others.” (Doc. #22). Despite filing for its marks over a year after VGS, VMP is trying to stop VGS from registering its marks even though they are not in the same class and VGS was the first to file.

VMP’s Trial Brief has failed to present any evidence of a likelihood of confusion between the marks, and overreaches by seeking to be the sole VALHALLA mark across all international classes, despite the fact that its prior use was specifically for motion picture and television show production, clearly not computer games or computer goods.¹ VMP advances a theory that it may prevent use in every field tangentially related to VMP’s mark in motion pictures and television shows. This should not be permitted.

Contrary to VMP’s claims that the VALHALLA mark is important for purposes of brand recognition and it has been using the VALHALLA mark and Viking Ship design for “nearly 20 years,”

¹ VGS does not concede the relevance or admissibility of evidence submitted by VMP. VGS reserves the right to object to evidence offered by VMP in support of its brief as plaintiff in the parent case and its brief as defendant in the child case.

the record reflects that it cared little about the mark prior to VGS's applications being filed – VMP's earlier word and design marks lapsed because of its failure to file the Section 8 affidavits, and its mark VALHALLA ENTERTAINMENT was abandoned because it failed to respond to an Office Action. VMP itself claimed that there was no likelihood of confusion with a recording studio offering recording studio service under the name VALHALLA because the marks had a different overall visual impression even though both had the term "Valhalla" and provided entertainment-related services. (Doc. #37, Hurd, at 43-45, Exh. 12; Doc. #37, Thomson, at 13-15, 19-20). Further, VMP's marks are far from well-known. As a preliminary matter, VMP's mark has not appeared on advertisements and packaging for its products, and there can be no likelihood of confusion when the mark is not visible to the consumer. *See Custom Manufacturing v. Midway Services, Inc.*, 508 F.3d 641, 652 (11th Cir. 2007). (Doc. #37, Hurd, at 42, 93-94; Doc #37, Thomson, at 37-38, 41-42). Additionally, VMP confuses the fame of several of its motion pictures, television programs, and its Chief Executive Officer Gale Ann Hurd, with actual brand recognition, and has provided no evidence whatsoever that any consumer knows the name "Valhalla Motion Pictures" or identifies any of its products with that name. (Doc #42, Hurd, at 50-51, Doc. #37, Hurd, at 92-105, Exhibits 13, 14, 15, 16, and 17; Doc. #41, Thomson, at 14-15). Though many of its titles may be recognizable, VMP submits no evidence of consumer awareness that these titles were developed by VMP.

VMP's proposed foray into the video game market is not only speculative, but goes far beyond its "natural" zone of expansion. VMP claims likelihood of confusion with VMP's properties throughout the "transmedia" world of entertainment, a category so limitless it essentially would give VMP a monopoly over the VALHALLA name in any kind of intellectual property, a holding that would be at odds with the entire history of trademark law. An analysis of every relevant *du Pont* factor proves that there is no likelihood of confusion between the marks and weighs in favor of granting VGS's application to register the marks VALHALLA GAME STUDIOS and VALHALLA GAME STUDIOS & Design.

STATEMENT OF THE ISSUES

The issues for trial are:

1. In the parent case, whether the application of VGS for VALHALLA GAME STUDIOS and VALHALLA GAME STUDIOS & Design should issue.

2. In the child case, whether the public is likely to be confused, mistaken, or deceived as to the source of the goods and services that VMP proposes to offer under the brand VALHALLA ENTERTAINMENT & Design.

RECITATION OF THE FACTS

I. THE PARTIES.

A. VALHALLA GAME STUDIOS CO. LTD. (“VGS”)

VGS was founded in 2008 by Satoshi Kanematsu, Tomonobu Itagaki, and Naoyuki Tsuji, video game industry veterans, to produce video games and video game merchandise. (Doc. #27, Kanematsu, at 7-8). Prior to founding VGS, Itagaki was the head of the Ninja Team at Tecmo, and was involved in the creation of world-renown video games Dead or Alive, games 1 through 4, and Ninja Garden, series 1 to 2. (*Id.* at 10, Exh. 2). Itagaki has sold around 14 million units of game software worldwide. (*Id.*; Doc. #47, Huntley, at 26-27). VGS’s first game is the highly anticipated “Devil’s Third” video game. (Doc. #27, Kanematsu, at 7-8, Exh. 2). VGS debuted the “Devil’s Third” trailer at the widely attended E3 show in 2010 and 2012, and it is available for streaming worldwide on YouTube. (*Id.* at 24; Doc #47, Huntley, at 35-37). VGS’s logo is prominently displayed on VGS’s website, in the trailers for the “Devil’s Third” game, and on various merchandising, including T-shirts, zippo cases, flags, and iPhone cases. (Doc. #27, Kanematsu, at 23-24, Exh. 5). VGS plans to continue developing its video game brand by developing original games. (*Id.* at 9-10).

B. VALHALLA MOTION PICTURES (“VMP”)

VMP is a motion picture and television show production company owned by Gale Ann Hurd. (Doc. #22; Doc. #42, Hurd, at 5). VMP has produced various films, including *Armageddon*, *Virus*, *Clockstoppers*, *Hulk*, *The Punisher*, and *Aeon Flux*, and the television show *The Walking Dead*. (Doc. #42). VMP has also published comic books, including *Anti*, *Dead Man’s Run*, and *The Scourge*. (Doc. #40, Kobylanski, at 15, Exhibit 51; Doc. #42, Hurd, at 15-16). VMP’s marks VALHALLA MOTION

PICTURES & Design, VALHALLA TELEVISION & Design, and VALHALLA ENTERTAINMENT & Design have appeared in the closing credits of some of VMP's projects. (Doc. #40, Kobylanski, at 31-32).

II. THE MARKS



A. VALHALLA GAME STUDIOS and

VGS first filed its application for the word mark VALHALLA GAME STUDIOS and design mark VALHALLA GAME STUDIOS & Design as an intent-to-use on March 2, 2010, and began use of the mark that year. VGS sought to register the mark for computer game programs; computer game software; computer software, namely, game engine software for video game development and operation; video game software in International Class 9, printed materials, namely, novels and series of fiction books and short stories featuring scenes and characters based on video games; series of computer game hint books in International Class 16; positionable toy figures and toy action figures in International Class 28; and design and development of computer game software and virtual reality software in International Class 42. The application was filed with the U.S. Patent and Trademark Office on March 2, 2010 and was published for opposition on November 15, 2011.



Fourteen months after VGS filed its intent-to-use applications, VMP filed registrations for VALHALLA MOTION PICTURES & Design, VALHALLA TELEVISION & Design and VALHALLA ENTERTAINMENT & Design. VMP's earlier registrations, specifically, Reg. No. 2384466 and Reg. No. 2389038 for VALHALLA MOTION PICTURES and VALHALLA MOTION PICTURES and design, were cancelled because of VMP's failure to file the Section 8 affidavit between the fifth and sixth

year. (Doc. # 35). VALHALLA ENTERTAINMENT, Serial No. 752118559 was abandoned because VMP failed to respond to an Office Action. (*Id.*) However, although the VALHALLA MOTION PICTURES marks were cancelled in 2007, they were assigned to VMP as of January 1, 2009 in a trademark assignment dated December 6, 2013. This goes to show that they were not interested in the marks until this opposition. (Doc. # 41, Thomson, at 8-9, Exh. 70).

VMP alleges that it currently owns and uses the following trademarks in connection with its business: 1) the design mark VALHALLA MOTION PICTURES for International Class 41 for motion pictures film production, filed with the U.S. Patent and Trademark Office on May 2, 2011; and 2) design mark VALHALLA TELEVISION for International Class 41 for television show production, filed with the U.S. Patent and Trademark Office on May 2, 2011.

Subsequent to the filing of the VGS Mark, on May 2, 2011, VMP filed its trademark application



to register the mark VALHALLA ENTERTAINMENT for motion picture film production and television show production (based on Use in Commerce as of October 31, 2010) and writing and editing scripts, teleplays and screenplays for others (based on Intent to Use) in International Class 41.

III. ARGUMENT

A. Because Opposer Fails to Carry its Burden of Proving Likelihood of Confusion Between Its Mark VALHALLA MOTION PICTURES and VALHALLA TELEVISION and VALHALLA GAME STUDIOS, this Board Should Deny the Petition Opposing Applicant's Registration.

VMP has the burden to prove to this Board that there is a likelihood of confusion between its marks, VALHALLA MOTION PICTURES and VALHALLA TELEVISION, and VGS's marks, VALHALLA GAME STUDIOS.

Section 2(d) of the Trademark Act provides, in relevant part:

[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it... [c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive...

15 U.S.C. § 1052(d) (emphasis added). As used in Section 2(d), “likelihood” of confusion is synonymous with “probable” confusion; it is insufficient if confusion is merely “possible.” 3 MCCARTHY ON TRADEMARKS § 23:3, p. 23-14 (citing *American Steel Foundries v. Robertson*, 269 U.S. 372 (1926)).

In making this decision the Board must consider the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973) (“*du Pont*”), which Opposer must prove by a preponderance of the evidence. The *du Pont* factors are: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression; (2) the similarity or dissimilarity and nature of the goods . . . described in an application or registration or in connection with which a prior mark is in use; (3) the similarity or dissimilarity of established, likely-to-continue trade channels; (4) the conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing; (5) the fame of the prior mark; (6) the number and nature of similar marks in use on similar goods; (7) the nature and extent of any actual confusion; (8) the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion; (9) the variety of goods on which a mark is or is not used; (10) the market interface between the applicant and the owner of a prior mark; (11) the extent to which applicant has a right to exclude others from use of its mark on its goods; (12) the extent of potential confusion; (13) any other established fact probative of the effect of use.

Further, the Ninth Circuit has laid out eight factors in analyzing the likelihood of confusion between marks in the case *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (“*Sleekcraft*”). Those factors include (1) the strength of the allegedly infringing mark; (2) the proximity or relatedness of the goods; (3) similarity in the sight, sound, and meaning of the marks; (4) evidence of actual confusion; (5) degree to which the marketing channels converge; (6) the type of goods and degree

of care consumers are likely to exercise in purchasing them; (7) intent of the defendant in selecting the allegedly infringing mark; and (8) likelihood that the parties will expand their product lines (zone of expansion). Courts have also considered the quality of the junior user's products or services to lessen the likelihood of confusion. *Polaroid Corp. v. Polaroid Electronics Corps.*, 287 F.2d 492 (2d Cir. 1961).

VMP argues that only certain factors of the *du Pont* case weigh in its favor, completely ignoring other factors. VGS believes this Board should consider all of the factors of *du Pont* as relevant to this Board's decision. VMP has failed to carry its burden of proving the *du Pont* factors and likelihood of confusion and this Board must deny the Opposition to VGS's marks.

B. VMP's Mark is Not "Strong," and in Fact is Not Even Known to Consumers; Thus, it is Entitled to No Added Protection Beyond That Given Any Other Registered Mark.

VMP argues that VALHALLA MOTION PICTURES is a strong mark and has cited the appearance of its mark in the closing credits of motion pictures and television shows, as well as news articles about Gale Ann Hurd and "The Walking Dead" as evidence of its inherent strength. (Brief, at 18, citing Doc. #40, Exh. 51, Doc. #43, Exhs. 17, 21, 23-24; Doc. #44, Exhs. 6-8, 14; Doc. #45, Exh. 1). However, the mark appears for a mere couple seconds in the motion pictures and television shows, and is never the primary focus of the articles, many of which identify Gale Ann Hurd or "The Walking Dead" in the headlines. (Doc. #42, Hurd, at 38). The true strength of a mark can only be determined by balancing the two dimensions of strength: (1) conceptual strength, that is, its placement on the spectrum of marks, and (2) its commercial strength. MCCARTHY ON TRADEMARKS § 11.83. As a threshold matter, purchasers must be likely to see the actual mark itself in order for them to be confused. *Custom Manufacturing v. Midway Services, Inc.*, 508 F.3d 641, 652 (11th Cir. 2007). In *Custom Manufacturing*, the court found that there was no likelihood of confusion because purchasers would be unable to see the mark at all and "the unauthorized use of a trademark that is never perceived by anyone cannot be said to create a likelihood of confusion." VMP's mark has never appeared on the advertisements for its motion pictures and films or packaging for video games it has consulted on. (Doc. #40, Kobylanski, at 31-32;

Doc. #42, Hurd, at 14). There is no potential for a likelihood of confusion because VMP's mark is not even visible to consumers.

In order to support its proposition that VMP's mark is "famous," VMP relies heavily on the fame of Gale Ann Hurd and "The Walking Dead," which while impressive, do not support the fame of its mark. Further, a majority of the articles cited that make any mention of the Valhalla name were published in 2014 and do not support VMP's proposition that its mark has been recognized by consumers for years (See Doc. #43, Exhs. 17, 21, 23-24; Doc. #44, Exhs. 6-8, 14). Rather than supporting VMP's proposition that its mark is famous, these articles primarily support the fact that VMP has been hard at work in the last year trying to create a record of the use of its mark and its supposed fame as a result of the instant proceeding. At the time of Gale Ann Hurd's deposition in this proceeding, there was nothing on VMP's website mentioning video games. (Doc. #37, Hurd, at 93-101, Exhs. 13-17; Doc. #37, Thomson, at 42-43). It appears that VMP has added video games to the website as a result of this proceeding, further evidence that any use of the mark is contrived for purposes of this opposition. (Doc. #42, Hurd, at 51-52; Doc. #37, Thomson, at 42-43.) VMP has not provided any independent evidence of its market strength. While it claims its commercial use of VALHALLA predates VGS's intent-to-use applications, the record reveals that VMP's marks do not appear on the packaging or in any video games that emanate from any of VMP's projects, and even when they do appear in motion picture or television show closing credits, the VMP mark appears for a few seconds at most. (Doc. #40, Kobylanski, at 14-15, 31-32, Doc. #37, Thomson, at 73-74, Exh. 52). The general rule is that trademark rights are not created by sporadic, de minimis use. *Major League Baseball Props., Inc. v. Opening Day Prods., Inc.*, 74 U.S.P.Q. 2d 1102 (S.D.N.Y. 2005) (use of mark on test basis on limited sales of clothing and "opening day" products with no further sales was casual and transitory, not deliberate and continuous use entitling mark to Lanham Act protection). On the other hand, "[w]here the public has been educated to recognize and accept a particular mark as the hallmark for a particular source of that product, or the mark itself is inherently unique or has been the subject of wide advertisement, it is a strong trademark." *E.I. Du Pont de Nemours & Co. v. Yoshida Int'l, Inc.*, 393 F.Supp. 502, 512 (E.D.N.Y. 1975).

Additionally, there are other similarly registered marks incorporating the word “Valhalla” for entertainment services besides VGS, weighing against the strength of VMP’s mark. Neither Gale Ann Hurd nor Julie Thompson were aware of the existence of a video game company called V. Valhalla Knights and were not aware why VMP did not file a cancellation proceeding against V. Valhalla Knights. (Doc. #42, Hurd, at 40-41; Doc. #41, Thompson, at 33). There are also numerous marks incorporating the term “Valhalla” registered with the USPTO, spanning a wide range of goods and services, including clothing, gambling machines, cigars, cables, Danish ham, fitness facilities, alcohol, a gun firing range, art gallery, spa services, business consulting services, and real estate brokerage services. (Doc. #33) There are also numerous marks incorporating the image of a viking ship registered with the USPTO, also spanning a wide range of goods and services, including clothing, entertainment services, restaurants, hotels, cruise ships, travel services, machinery, business networking, special event planning, vodka, education, spices, capacitors, lumber, wines, kitchen cabinetry, computer software, magnets, jewelry pins, books, stickers, glassware, toys and sporting goods, automobiles, health spas and business marketing consulting. (Doc # 34). Furthermore, numerous goods depict many different types of viking ships. (Doc. #31, Exhs. 9-22). Besides the instant proceeding, VMP has not demonstrated efforts to protect the use of its mark, and it is not a “well-known” senior user in the marketplace. (Doc. #37, Hurd, at 46-49, Doc. #42, Hurd, at 40). Thus, because VMP’s mark is not a strong mark known to consumers, it does not deserve any greater protection than any other registered mark.

C. The Parties’ Goods are Dissimilar, Travel in Different Channels of Trade, and Are Not Marketed Under Similar Conditions.

VMP states that it markets motion pictures, television shows, comic books, and multimedia projects and websites and insinuates that video games are a related product that may be marketed online and in brick-and-mortar stores, where VMP’s products are now sold. (Brief, at 16-18). However, it is worth pointing out that there can be no likelihood of confusion as to marketing between the marks because VMP has failed to present any evidence that it actually uses its mark on advertisements or packaging and is recognized by consumers. (Doc. #40, Kobylanski, at 32). In the past, the video games

that VMP has consulted on have had mainstream appeal, often video games coordinated with the release of feature films, such as Aeon Flux and The Hulk. (Doc. #42, Hurd, at 32-34, Exhs. 73-74). Further, there is no identification of VMP on the video games, and they were not even sold on VMP's website until after the deposition of Gale Ann Hurd. (Doc. #42, Hurd, at 51-52; Doc. #41, Thomson, at 27-29; Doc. # 37, Thomson, at 42-43; Doc. #40, Kobylanski, at 36-48, Exhs. 58, 67-69). Even assuming VMP's products featured its marks and were recognizable to consumers, the fact that products can be categorized in the same broad "field" does not, in and of itself, provide a basis for regarding the products as "related." *In re Digirad Corp.*, 45 U.S.P.Q.2d 1841 (1998) (holding that despite some industry "overlap," DIGIRAY and DIGIRAD are not confusingly similar for high tech medical diagnostic equipment used for different purposes); *see also, Cooper Industries Inc. v. Repcoparts USA, Inc.*, 218 U.S.P.Q. 81, 84 (T.T.A.B. 1983) ("the mere fact that the products involved in this case (or any products with significant differences in character) are sold in the same industry does not of itself provide an adequate basis to find the required 'relatedness'"). Thus, the fact that DVDs and video games are both products in the broad entertainment field does not make them related. Movies and television shows can be consumed by the consumer on a passive basis, simply viewing DVDs, while video games are interactive and engage the consumer.

Furthermore, VGS and VMP sell their respective goods in different channels of commerce. While VMP's products are sold at mainstream stores that sell DVDs, VGS's products are marketed to its target market, hard-core gamers, at video game specialty stores such as GameStop. Where parties advertise in different media or media directed at different potential customers, the likelihood of confusion is reduced. *Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700 (3d Cir. 2004). The video games VMP has licensed based on its properties are geared towards a broader audience of video game players who are buying games based on films or television shows because they are fans of those titles. For example, "The Walking Dead" video game may be advertised in a general entertainment magazine like Entertainment Weekly, while "Devil's Third" is advertised to a narrower "hard core" gamer crowd. VGS advertises on webzines in the United States, such as IGN and GameSpot, in the publication Game

Informer, and gaming conventions, such as E3, outlets that are specifically focused on video game enthusiasts. (Doc. # 27, Kanematsu, at 12-13; Doc. #27, Tsutsumi, at 14-16).

VMP has failed to carry its burden under this *du Pont* factor, first, by failing to present any evidence that it actually uses its mark to market its products, and second, by failing to present evidence that the products are related and travel in the same channels of trade.

D. The Parties' Goods Are Marketed to Different Consumers.

As stated above, VMP cannot possibly define its potential customer as hard-core gamers, as it has yet to make any concrete plans to expand into the video game market. Kristopher Henigman stated that he has never been involved in any projects involving any of VMP's intellectual property and there has been no attempt to create a video game with VMP's intellectual property. (Doc. #37, Henigman, at 26-27). On the other hand, VGS's products has already began using its mark on its products, and has already started advertising in print and online gaming magazines and online for the release of its video game, "Devil's Third." (Doc. #38). Further, its products are specifically sought out by gamers who are familiar with Itagaki, who has a reputation as a famous, top-tier designer and developer in the field. (Doc. #47, Huntley, at 26-29; Doc. #38). The consumer group for video games like "Devil's Third" is narrower than that for motion pictures and television shows, and would skew heavily male and younger based on its hyper level of violence. (Doc. #47, Huntley, at 43-44). Thus, even if VMP could show evidence of its plan for expansion into the video game industry, the products would likely be marketed to different consumers and there would be no likelihood of confusion.

E. VGS's and VMP's Marks Are Not Similar in Appearance, Sound, Connotation, or Commercial Impression.

It is well settled that the degree of similarity required to establish likelihood of confusion varies with the differences in the products and services offered. *Washington Speaker's Bureau, Inc. v. Leading Authorities, Inc.*, 33 F.Supp.2d 488 (E.D. Va. 1999), *aff'd* 217 F.3d 843 (4th Cir. 2000); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979). In order to determine the degree of similarity, the Board has traditionally looked to the overall commercial impression made by the words or phrases that compose

the mark, their pronunciation, meanings, and connotation. VMP avers that the marks are similar in appearance based on the fact that each design mark contains the word “Valhalla” and “a Viking Ship cresting a wave at sea.” (Brief, at 15). However, the analysis ignores the visual dissimilarities and the overall commercial impressions of the marks. In fact, contrary to what is stated in Opposer's brief, the VMP Viking Ship is on a cloud. (Doc. #42, Hurd, at 11 and 31).

The only real similarity between the marks is the “Valhalla” name and a ship, and both the names and ships differ in style. VMP itself claimed that there was no likelihood of confusion with a recording studio offering recording studio service under the name VALHALLA because the marks had a different overall visual impression even though both had the term “Valhalla” and provided entertainment-related services. (Doc. #37, Hurd, Exh. 12). But for the newfound importance it attaches to the VALHALLA name, VMP’s analysis would be the same here – the marks both use the VALHALLA name but have few other similarities. VGS’s logo is actually a drekar, a dragon-headed longship which was a war ship and narrower and less spacious than merchant ships, known as Knarr or Knorr. (Doc. #31, Exhs. 1-7). A typical warship usually had sixteen or more rowers on each side and was powered by oars and supplanted by sail. (*Id.*) VMP’s logo is closer in design to the Knarr, Knorr, a yacht or merchant ship, as it has what appears to be about six oars on the side of the ship that is seen in the logo and animation. The Knorr only had a few oar-holes as it was mostly sailed and oars were probably only used for maneuvering in preparation for landing. (Doc. #31, Exhs. 1-7). VGS’s logo depicts the crew’s shields on the side of the ship, which indicates a warship, while VMP’s logo does not have any shields. Additionally, VGS’s ship is on a rough and choppy sea, heading toward the left. (Doc. #48). Contrastingly, VMP’s mark features a traditional sailing ship situated on a cloud, under a crescent moon, facing right. (Doc. #49, Doc. #42, Hurd, at 11 and 31). The marks also include the additional descriptive words “Game Studios” for VGS and “Motion Pictures” and “Television” for VMP. A cursory glance at these marks makes the distinctions evident.

Case law confirms the distinctive import of additional formatives in evaluating visual dissimilarities. Although the marks both use the word “Valhalla,” the additional components are

sufficient to distinguish the marks from each other when evaluating prospective consumer confusion. *See, e.g., In re Hearst Corp.*, 982 F.2d 493 (Fed. Cir. 1992) (finding the presence of the term GIRL in VARGA GIRL sufficient to distinguish that mark from VARGAS for identical goods; *accord, In re Bed and Breakfast Registry*, 791 F.2d 157 (Fed. Cir. 1986) (finding the marks BED AND BREAKFAST REGISTRY and BED AND BREAKFAST INTERNATIONAL were not confusingly similar because the marks must be considered in their entireties such that even descriptive elements cannot be ignored); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386 (Fed. Cir. 1989) (PECAN SANDIES not confusingly similar to PECAN SHORTEES).

In addition to the formative distinctions, the marks are stylistically distinct, which further militates against a likelihood of confusion. Such distinctions are compelling when assessing a likelihood of confusion, because confusion is less likely where the lettering style of a registered mark is dissimilar to that of the challenged mark. 3 MCCARTHY ON TRADEMARKS § 23:52, 23-164 (explaining that “[i]f defendant has used plaintiff’s mark in the same lettering, style, color, format, etc., then the likelihood of confusion is increased, whereas if the lettering style is dissimilar, confusion is less likely”). *See also Luigino’s, Inc. v. Stouffer Corp.*, 170 F.3d 827 (8th Cir. 1999) (concluding that different typeface, colors, and trade dress and use of house marks supports finding of no likelihood of confusion); *accord, King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084 (10th Cir. 1999) (finding that the distinctive gothic lettering of plaintiff’s mark contributed substantially to the lack of a likelihood of confusion with the challenged mark: “[T]he visual impact of the plaintiff’s mark and the defendants’ logo differs dramatically... the marks of plaintiff and defendant do not convey the same meaning or stimulate the same mental reaction. Plaintiff’s marks are simple, reserved, and dignified... Defendant’s mark is bright and attention-grabbing, connoting the fun and speed associated with ski racing. Thus, the first and most important factor, similarity of the marks, weighs heavily in defendants’ favor”).

Not only is the visual impact of the two ships different but combining the graphics with the different fonts, the overall feel of the marks is dramatically different. The focal point of VGS’s mark is the dragon ship, on a rough sea, and this effect is highlighted by the jagged cursive script of the

“Valhalla” text. In contrast, VMP’s mark has a serene vibe, with a regal ship under a crescent moon, riding on a cloud, and this effect is highlighted by the word “Valhalla” in all caps and spaced out. Taken as a whole, the marks’ apparent stylistic differences diminish, if not completely obviate, any cognizable prospect of consumer confusion.

F. VMP’s Claimed “Natural” Zone of Expansion Goes Far Beyond Any Reasonable Expectations and is Not Based on Concrete Plans.

In order to be weighed in a trademark owner's favor, the possibility of expansion into the other markets cannot be merely theoretical. Mere assertions of an intent to or interest in expanding will not suffice and the expansion should be contemplated "soon" or "in the reasonably near future." *Checkpoint Systems, Inc. v. Check Point Software Technologies Inc.*, 269 F.2d 270, 290 (3d Cir. 2001); *Survivor Media, Inc.* at 634 (finding plaintiff's mere "expressed interest in expanding his product line" to be insufficient and speculative). The Sixth and Ninth Circuits explicitly require a "strong possibility" of expansion for this factor to tip the scales in support of finding infringement. *M2 Software Inc. v. Madacy Entertainment*, 421 F.3d 141, 150 (9th Cir. 2005).

In *M2 Software*, the court found that the sale of only 215 audio CDs over ten years undermined plaintiff's claims of expansion into general retail distribution of CDs that would compete with the defendant. Plaintiff, owner of M2, used its mark in connection with business management and interactive media application goods and services for the film and music industry. Defendant, Madacy Entertainment, began using M2 Entertainment as a trademark for their new record label venture. M2 Software distributed a line of products that included audio CDs and a website that provided audio content for downloading. Although M2 claimed that it began to broaden marketing of its interactive content on the internet, there must be a *strong* possibility of expanding into competing markets for the factor to weigh in finding of infringement. Since M2 only sold 215 CDs over a ten-year period, it was doubtful that M2 would expand into general retail distribution of audio CDs and this factor weighed in favor of Madacy.

Courts look at the party's concrete plans for expansion, if any, as well as evidence that other companies sell products in both markets. *Checkpoint Systems, Inc.*, F.2d at 290. In *Checkpoint Systems*,

Inc., the court stated they looked to evidence about whether or not the "consuming public might expect the prior owner to manufacture a product in the defendant's market, or that it is likely to expand into that market." *Id.* Courts may also look more generally at evidence that the products are so closely related that the "consuming public might find it natural for one company" to sell products in both markets. *Id.* That court found that there was little evidence that either party operated in both the physical security and network security markets. Even though both products employed some overlapping computer technology, Plaintiff's products were intended to provide consumers with physical access security compared to defendant's products which consumers buy for network information security products. As such, this factor weighed in favor of the defendant. *Id.*

Here, VMP has only presented evidence of artificial discussions concerning the possibility of entering the video game market, without showing any concrete plans for expansion, and this factor must weigh against it. Hurd testified that VMP has not done anything or taken any steps to actually produce video games itself. (Doc. #42, Hurd, at 47). VMP has met with video game companies to discuss partnering on various projects, but has not put together a written business plan, or budget in order to expand into video game production. (Doc. #42, Hurd, at 46-47; Doc. #37, Henigman, at 26-27; Doc. #37, Henigman, at 41-43). Kobylanski testified that he attended E3 in 2014 as a representative of VMP and met with companies like Capcom, Konami, Sega, Square Enix, and Telltale "to hear about their available intellectual properties and to tell them a little bit about our company and what we're looking to do, the stories that we're looking to tell, to see if there's any business to be had." (Doc. #50, Kobylanski, at 6-9). He also met with ANEW and has discussed the game Castlevania with Konami but discussions have stalled. (*Id.*) Simply put, VMP has not proven "a strong possibility of expansion."

VMP has not shown that the consuming public would expect VMP to manufacture video games. The relevant consuming public would not expect VMP, a producer of films, television shows, and comic books, to expand into the video game market, partially because it is a smaller production company, rather than a major studio, who is more prone to expand into related multimedia markets. In the entertainment industry, generally only large studios have divisions devoted to producing video game content, while

small studios have only produced digitally delivered and mobile games. (Doc. #47, Huntley, at 37-39; Doc. #37, Roberts, at 38-44). Thus, expanding into video games is not a “natural” expansion expected by the public, who may be familiar with VMP’s films and television shows.

Further, VMP’s definition of the “natural” zone of expansion is limitless. It defines the word “transmedia” and has produced articles describing transmedia that say nothing about the ability to trademark “transmedia,” an amorphous concept that encompasses user generated content and potentially anything considered a “creative work.” (See Doc. #42, Hurd, at 5-6, 8, 14). In reality, the word “transmedia” on its own is meaningless – it is inherently attached to some other good, particularly a piece of intellectual property. The fame of a mark for its core products does not necessarily extend to its collateral products, particularly if the collateral product sales and advertising are limited. *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 625 (6th Cir. 2003). Here, VMP’s mark is barely even featured on its core products, motion pictures and television shows, so its mark is not recognizable to consumers, and further, it has yet to produce evidence of concrete plans for collateral products, such as video games, which supports its proposition for a likelihood of confusion in those classes.² VMP should not be permitted to lay claim to essentially all classes of goods without having made any legitimate plans to enter those classes. Because entertainment encompasses so many other fields, the supposed natural zone of expansion, if VMP’s argument is upheld, would virtually foreclose the use of a similar name to a small production company in every other international class. Permitting this type of monopoly over the use of a mark across all classes would contradict the entire history of trademark law.

G. The Likelihood of Confusion is Reduced Because Video Games are a High-End Product.

As a threshold matter, purchasers must be likely to see the actual mark itself in order for them to be confused. *Custom Manufacturing v. Midway Services, Inc.*, 508 F.3d 641, 652 (11th Cir. 2007). There

² No evidence has been submitted proving that VMP’s marks are displayed on its products or that consumers knows or identifies any products with VMP. Because there is no evidence that consumers recognize VMP’s mark, there is simply no likelihood of confusion. See *Custom Manufacturing v. Midway Services, Inc.*, 508 F.3d 641, 652 (11th Cir. 2007).

simply is no likelihood of confusion if purchasers would be unable to see the mark at all, as "the unauthorized use of a trademark that is never perceived by anyone cannot be said to create a likelihood of confusion." As mentioned above, VMP's mark has never appeared on the packaging for any of the video games it has consulted on. (Doc. #40, Kobylanski, at 31-32, 36-48, Exhs. 58, 67-69). In contrast, VGS's logo is prominently displayed on VGS's website, in the trailers for the "Devil's Third" game, and on various merchandising, including T-shirts, zippo cases, flags, and iPhone cases. (Doc. #27, Kanematsu, at 23-24, Exh. 5).

Video games are costly. Where a product cost is high, or consumers would otherwise exercise great care in selecting the product, the likelihood of confusion is reduced. *Kemp v. Bumble Bee Seafoods, Inc.*, 398 F.3d 1049, 1054-55 (8th Cir. 2005). The level of care a consumer takes in examining goods and services is perceived as lower for low-cost or impulse purchases because consumers are not spending much money and therefore not as attentive as they would be if for they were purchasing more expensive items. Where the purchaser is not paying attention, he or she might not notice minor differences in trademarks or trade dress and could be more easily confused. *Survivor Media, Inc. v. Survivor Products*, 406 F.3d 625 (9th Cir. 2005). Courts have found low price/impulse purchases to include cheap t-shirts, costume jewelry, coffee and tea, steak sauce, fast food, and car care products. Where the product is moderately-priced, the consumer care factor is likely to be neutral and not favor either party. *Id.*

Courts and the T.T.A.B. classify purchasers into two types: ordinary purchasers and discriminating or sophisticated purchasers. Ordinary purchasers, those with no special training or experience, are generally thought to be capable of exercising a low to moderate degree of care in distinguishing between two trademarks at the time of purchase. On the other hand, sophisticated purchasers, those with special training, or discriminating purchasers, who buy more expensive products, are thought to employ a higher degree of care and are more able to distinguish between trademarks. *Barbeque Marx, Inc. v. 551 Ogden, Inc.*, 235 F.3d 1041, 1045 (7th Cir. 2000). Products that elicit a high degree of care include swimwear, real estate, veterinary care, industrial equipments, and banking and

other financial services. Courts generally regard confusion as more likely among ordinary purchasers and less likely among discriminating or sophisticated purchasers.

Video games are not impulse buys since they are not cheap products and people are careful in choosing which video game they buy. James Huntley stated that while there is overlap with the audience for “The Walking Dead” and “Devil’s Third,” the consumers for “Devil’s Third” would skew heavily male and younger based on gender and age appeal, 18-30 range because of its hyper level of violence. (Doc. #47, Huntley, at 43-44). Thus, given the high price point for video games, purchasers are likely to be more discriminating and sophisticated, and there is no likelihood of confusion.

H. VGS Had No Knowledge of VMP’s Mark and Further, Does Not Wish to be Associated with VMP’s Mark

VGS’s selection of the “Valhalla” name was wholly unrelated to VMP’s use of the word “Valhalla”, as the idea for the mark was the original idea of Satoshi Kanematsu, and VGS’s followers are, for the most part, hard-core gamers and VGS does not stand to benefit from an association with VMP. As pointed out above, when VGS applied for its marks, VMP had no registered marks, as its prior marks had been effectively abandoned.³ When courts examine a defendant's intent in a likelihood of confusion analysis, they ask whether the defendant meant to capitalize on the plaintiff's good will by causing consumers to believe that the defendant's product was created or sponsored by the plaintiff. In other words, it is not just the intent to copy, but also the intent to pass one's goods off as those of another. *Meridian Mutual Insurance Co. v. Meridian Insurance Group, Inc.*, 128 F.3d 1111 (7th Cir. 1997). This element weighs in favor of VGS because it had no knowledge of VMP’s mark and absolutely no intent to capitalize on VMP’s goodwill. Kanematsu testified that the idea for the VGS name came from Viking mythology, as Valhalla is the name of a brave warrior and means the same as “the few and the proud,” which Kanematsu believed captured the spirit of the company. (Doc. #27, Kanematsu, at 14-15). Further, Kanematsu is a rock enthusiast and the lyrics, “Valhalla, I am coming” appear in a Led Zeppelin song that

³ Because VMP had no registered marks and VMP does not prominently display its marks on its products, there is even less of a likelihood of any knowledge of its former marks at the time of VGS’s applications.

he enjoys. (*Id.* at 18; Doc. #27, Exh. 4). VGS never even knew that VMP existed until they received the cease and desist letter. (Doc. #27, Kanetmatsu, at 19-20; Doc. #27, Tsutsumi, at 16-17). VGS has no plans to go into the industries VMP currently occupies, motion picture or television production, and had no intent of passing its own goods off as VMP's. (Doc. #27, Kanetmatsu, at 9-10).

I. No Evidence of Actual Confusion

VMP has admitted it has no instances of actual confusion between its mark and VGS's mark. (Doc. #47, Huntley, at 42; Doc. #37, Henigman, at 36, Doc. #37, Hurd at 57; Doc. #37; Doc. #37, Roberts, at 36; Doc. #41, Thomson, at 34). Actual confusion is a *du Pont* factor and is one of the most critical elements of any claim for likelihood of confusion. *American Historic Racing Motorcycle Association, Ltd. V. Team Obsolete Promotions*, 33 F.Supp.2d 1000 (M.D. Fla. 1998) (evidence of actual confusion is one of the most important factors in considering the likelihood of confusion). This Board must also consider the length of time the marks and the products have been competing in the marketplace. It might be understandable to have no instances of confusion if VGS recently entered the market but that is not the case: VGS has been using its marks since 2010, and VMP alleges it has been using its marks for nearly twenty years. In at least four years, there has never been any instance of confusion. VMP has argued that this is due to VGS not yet having sold its product, but this is without merit because as stated above, VGS's logo is prominently displayed on VGS's website, in the trailers for the "Devil's Third" game, which have been featured at the E3 shows and are available online, and on various merchandising, including T-shirts, zippos cases, flags, and iPhone cases. (Doc. #27, Kanematsu, at 23-24, Exh. 5). Huntley, who is the former marketing director of video game publisher THQ and very knowledgeable in the field, testified that despite being a huge fan of "The Walking Dead," he had never heard of VMP or Valhalla Entertainment prior to this proceeding. (Doc. #47, Huntley, at 42-43). On the other hand, Huntley was aware of VGS's mark because it was featured on their website "front and center" and featured at the beginning of all video game trailers. (*Id.* at 36-37). VMP has failed to carry its burden of proof on this factor and there has been no showing of actual confusion.

CONCLUSION

Likelihood of confusion is a fact question. *du Pont*, 476 F.2d at 1361. For all of the reasons listed above, VMP has failed to meet its burden of showing a likelihood of confusion. There simply can be no likelihood of confusion where, as here, VMP's mark is not known or visible to consumers, and there is no basis for giving VMP's mark any added protection above that of any other registered mark. Further, VMP's supposed "natural" zone of expansion lacks any basis in the evidence or the history of trademark law, as it seeks to foreclose the use of any similar name in every other international class based on its use in the entertainment field. This should not be permitted. VMP's Opposition should be denied, and VGS's marks should issue.

Dated: February 12, 2015

Respectfully submitted,

Valhalla Game Studios Co. Ltd.

/MG/

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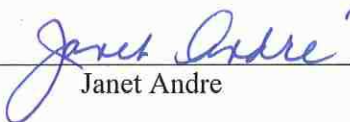
CERTIFICATE OF SERVICE

I hereby certify that this **APPLICANT'S BRIEF IN RESPONSE TO OPPOSER'S BRIEF IN SUPPORT OF OPPOSITION** is being filed electronically with the United States Trademark Trial and Appeal Board pursuant to 37 C.F.R. § 18.

I hereby further certify that on February 12, 2015, a true and complete copy of the foregoing **APPLICANT'S BRIEF IN RESPONSE TO OPPOSER'S BRIEF IN SUPPORT OF OPPOSITION** has been served on Opposer by electronic mail addressed to:

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Dated: February 12, 2015



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